

THIS OPINION IS NOT A  
PRECEDENT OF THE TTAB

Hearing: October 19, 2023

Mailed: November 8, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Stonemaier LLC*  
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Serial No. 90731004  
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Scot Duvall of Stites & Harbison PLLC,  
for Stonemaier LLC.

Lucy Browne, Trademark Examining Attorney, Law Office 125,  
Robin Mittler, Managing Attorney.

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Before Adlin, Heasley, and Elgin,  
Administrative Trademark Judges.

Opinion by Elgin, Administrative Trademark Judge:

Applicant Stonemaier LLC seeks registration on the Principal Register of the  
mark WINGSPAN (in standard characters) for

downloadable electronic game programs for playing  
strategy board and tabletop strategy games; downloadable  
video game programs for playing strategy board and  
tabletop strategy games; downloadable mobile applications  
for playing strategy board games and tabletop strategy  
games; downloadable computer game programs for playing  
strategy board games and tabletop strategy games;  
downloadable computer game software for playing strategy  
board games and tabletop strategy games; downloadable  
interactive game programs for playing strategy board

games and tabletop strategy games; downloadable interactive game software for playing strategy board games and tabletop games; downloadable interactive video game programs for playing strategy board games and tabletop games; downloadable software featuring interactive digital tabletop games for playing strategy board games and tabletop games; downloadable software, namely, game programs for playing strategy board games and tabletop games; downloadable software, namely, content packs for use with digital platforms for playing strategy board games and tabletop strategy games; downloadable augmented reality software for use in mobile devices for integrating electronic data with real world environments for the purpose of playing strategy games; downloadable augmented reality software for playing computer strategy games; all of the foregoing games being themed in the field of ornithology, birds, and wildlife, in International Class 9;

strategy board games; tabletop strategy games; equipment sold as a unit for playing strategy board games; equipment sold as a unit for playing tabletop strategy games; expansions for strategy board games, namely, additional game components for preexisting strategy board games; expansions for tabletop strategy games, namely, additional game components for pre-existing tabletop strategy games; gamepieces and tokens specially adapted for strategy board games; gamepieces and tokens specially adapted for tabletop strategy games; game boards for tabletop strategy games; game boards for strategy board games; tabletop strategy game accessories, namely, specialized game play mats; strategy board game accessories, namely, specialized game play mats; tabletop strategy game accessories, namely, specialized tokens; strategy board game accessories, namely, specialized tokens; strategy board game expansion packs; tabletop strategy game expansion packs; strategy board game upgrade packs comprised of equipment sold as a unit for playing strategy board games; tabletop strategy game upgrade packs comprised of equipment sold as a unit for playing tabletop strategy games; all of the foregoing games being themed in the field of ornithology, birds, and wildlife, in International Class 28; and

entertainment services, namely, providing temporary use of non-downloadable interactive games in the nature of online strategy board games and tabletop strategy games; all of the foregoing games being themed in the field of ornithology, birds, and wildlife, in International Class 41.<sup>1</sup>

The Trademark Examining Attorney refused registration under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that Applicant's mark, as applied to the goods and services identified in the application, so resembles the Principal Register mark WINGSPAN in standard characters for "Toy action figures and accessories for use therewith; toy vehicles and accessories for use therewith" in International Class 28<sup>2</sup> as to be likely to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration, which was denied. The appeal is fully briefed, and counsel for Applicant and the Examining Attorney appeared at an oral hearing before the panel on October 19, 2023.

For the reasons set forth below, we affirm the refusal to register in all classes.

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<sup>1</sup> Application Serial No. 90731004 was filed on May 24, 2021 under Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a), based on Applicant's claim of first use anywhere and use in commerce since at least as early as February 27, 2019 as to the goods and services in Classes 9 and 41 and January 9, 2019 as to the goods in Class 28. A refusal under Section 2(d) based on Registration No. 2331748 for WINGSPAN in International Class 42 was withdrawn.

<sup>2</sup> Registration No. 5681611, issued February 19, 2019.

## I. The Record on Appeal

The record includes the file of the subject application, automatically part of the record; pages from the USPTO databases regarding the cited registration,<sup>3</sup> screenshots of third party Internet webpages<sup>4</sup> and third party registrations<sup>5</sup> made of record by the Examining Attorney; and the Declaration of Applicant's President Jamey Stegmaier,<sup>6</sup> ten pairs of third party registrations,<sup>7</sup> and a dictionary definition for the term "wingspan"<sup>8</sup> made of record by Applicant.

In addition, the Examining Attorney and Applicant request that we take judicial notice of dictionary definitions for the term "action figure" attached to their briefs.<sup>9</sup> Because we may take judicial notice of online dictionaries that exist in printed format or have regular fixed editions, we have considered this evidence. *See In re White Jasmine LLC*, 106 USPQ2d 1385, 1392 n.23 (TTAB 2013).

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<sup>3</sup> February 8, 2022 Office Action, at TSDR 8-9. Page references to the application record refer to the downloaded .pdf version of USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal are to the Board's TTABVUE docket system. *See In re Integra Biosciences Corp.*, 2022 USPQ2d 93, at \*7 (TTAB 2022). Applicant's brief is at 6 TTABVUE and its reply brief is at 9 TTABVUE; the Examining Attorney's brief is at 8 TTABVUE.

<sup>4</sup> February 8, 2022 Office Action, at TSDR 10-27; July 21, 2022 Office Action, at TSDR 28-52; February 24, 2023 Denial of Request for Reconsideration, at TSDR 48-65.

<sup>5</sup> June 21, 2022 Office Action, at TSDR 7-52; February 24, 2023 Denial of Request for Reconsideration, at TSDR 10-47.

<sup>6</sup> June 15, 2022 Response to Office Action, at TSDR 18-24.

<sup>7</sup> *Id.*, , at TSDR 47-67; January 23, 2023 Request for Reconsideration, at TSDR 24-113.

<sup>8</sup> January 23, 2023 Request for Reconsideration, at TSDR 23.

<sup>9</sup> *See* 8 TTABVUE 19-22; 9 TTABVUE 8-9, 14-19.

## II. Likelihood of Confusion

When the question is likelihood of confusion, we analyze the evidence relating to the factors set out in *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”); see also *In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). We must consider each *DuPont* factor for which there is evidence or argument. See, e.g., *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. See *In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at \*4 (Fed. Cir. 2023) (“The Board is required to consider each factor for which it has evidence, but it can focus its analysis on dispositive factors.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (“Not all of the *DuPont* factors are necessarily ‘relevant or of equal weight in a given case, and any one of the factors may control a particular case.’”) (citing *In re Majestic Distilling Co.*, 65 USPQ2d at 1204).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and services. *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); see also *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes

to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

Those factors, and others, are considered below. In particular, Applicant presents evidence or argument concerning the first (similarity of marks), second (similarity of goods and services), fourth (consumer sophistication), and thirteenth (other) *DuPont* factors.

#### **A. Similarity or Dissimilarity of the Marks**

We begin our analysis by comparing, under the first *DuPont* factor, “the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial impression.” *Palm Bay Imps. v. Veuve Cliquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005).

It is undisputed that the marks are identical in sight and sound. Applicant argues, however, that the term WINGSPAN as applied to its goods and services engenders a different connotation than the identical term in the cited registration, resulting in significantly different commercial impressions.<sup>10</sup> Applicant contends, inter alia:

First, since Applicant’s goods and services are expressly themed in the field of “ornithology, birds, and wildlife,” Applicant’s mark has a distinct connotation relating to birds, insofar as the term “wingspan” is defined as “the distance between the ends of the wings of a bird, insect, or aircraft.” . . . By contrast, the goods of the Cited Registration include “toy vehicles” in Class 028. . . . The identification of the goods of the Cited Registration therefore confirm a different connotation of WINGSPAN in connection with such toys as relating to “the distance between the ends of the wings of . . . aircraft,” rather than

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<sup>10</sup> See 6 TTABVUE 15-16.

“the wings of a bird,” much less the theme of ornithology, birds, and wildlife as specifically stated in the Application.<sup>11</sup>

In response, the Examining Attorney argues Applicant has “cherry pick[ed]” a commercial impression that WINGSPAN refers to aircraft wings. Relying on dictionary definitions of “action figure,” the Examining Attorney contends Registrant’s “toy action figures” does not exclude figures of people, animals, or other objects and may include birds and insects, and “toy vehicles” is not limited to aircraft.<sup>12</sup> Applicant counters that relevant consumers would not view electronic and board games themed in the field of “ornithology, birds, and wildlife” as having the same connotation as Registrant’s action figure or toy vehicle, which (according to its dictionary definitions) has “an action component” and particularly refers to mass media characters such as superheroes.<sup>13</sup>

We find the connotation of the term WINGSPAN may vary, but only slightly. Consumers will view WINGSPAN as the measurement of the distance between the

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<sup>11</sup> *Id.* at 16 (citations omitted); *accord*, 9 TTABVUE 7 (“In the case of Applicant’s mark for which the goods/services are specifically identified with ‘ornithology, birds, and wildlife,’ the connotation of ‘the distance between the ends of the wings of a bird, insect’ logically applies to Applicant’s goods/services, but not the “toy vehicles” of the Cited Registration, for which ‘the distance between the ends of the wings of . . . aircraft’ is clearly applicable.”).

<sup>12</sup> 8 TTABVUE 6, 21-22 (COLLINS ENGLISH ONLINE DICTIONARY, defining “action figure” as “a small figure of a character from a film, television programmer, comic book, etc., designed as a toy and often collected by enthusiasts”; and MERRIAM-WEBSTER ONLINE DICTIONARY, defining “action figure” as “a small-scale figure (as of a superhero) used especially as a toy.”).

<sup>13</sup> 9 TTABVUE 7-9, 15-19 (Dictionary.com, defining “action figure” as “a toy figure with jointed, movable limbs, representing a character in a cartoon, movie, etc., or a real person or animal, often one known for exciting action or extraordinary powers”; and THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, defining “action figure” as “[a] small, usually molded plastic toy figure, often having movable joints and typically representing a character from a movie, television show, comic book, or other popular entertainment medium.”).

tip of one wing to another, whether that be a bird or a toy or a vehicle with wings. Moreover, we find the commercial impressions of the marks to be very similar in view of the identical appearance and sound, and highly similar (if not identical) connotations. *See In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*4 (TTAB 2019) (no evidence that identical marks engender different impressions as applied to non-identical goods and services).

The similarity of the marks under the first *DuPont* factor weighs heavily in favor of a finding of likelihood of confusion.

**B. Similarity or Dissimilarity of Goods and Services and Established, Likely-to-Continue Trade Channels**

The second *DuPont* factor “considers ‘[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration,” *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir 2018) (quoting *DuPont*, 177 USPQ at 567). Our comparison is based on the goods and services as identified in Applicant’s application and the cited registration. *See Stone Lion Cap. Partners, L.P. v. Lion Cap. LLP*, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014) (citing *Octocom Sys., Inc. v. Hous. Comput. Servs., Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019).

The greater the degree of similarity between the parties' marks, the lesser the degree of similarity required between the parties' goods and services to support a finding of likelihood of confusion. *DeVivo v. Ortiz*, 2020 USPQ2d 10153, \*11 (TTAB 2020) (“[B]ecause the marks are identical, the degree of similarity between the goods [and services] . . . required for confusion to be likely declines.”) (citing *Orange Bang, Inc. v. Olé Mexican Foods, Inc.*, 116 USPQ2d 1102, 1117 (TTAB 2015)); see also *In re Country Oven*, 2019 USPQ2d 443903, at \*5; *In re Embiid*, 2021 USPQ2d 577, at \*23 (TTAB 2021). Even when goods or services are not competitive or intrinsically related, the use of identical marks can lead to the assumption of a common source. See *In re Shell Oil*, 992 F.2d 1204, 26 USPQ2d 1687, 1689 (Fed. Cir. 1993); *In re Opus One, Inc.*, 60 USPQ2d 1812, 1815 (TTAB 2001); *In re Wilson*, 57 USPQ2d 1863, 1867 (TTAB 2001).

“Evidence of relatedness may include news articles or evidence from computer databases showing that the relevant goods and services are used together or used by the same purchasers; advertisements showing that the relevant goods and services are advertised together or sold by the same manufacturer or dealer; or copies of use-based registrations of the same mark for both the applicant's [goods] and the goods listed in the cited registration.” *In re Country Oven*, 2019 USPQ2d 443903, at \*4-5.

As a reminder, Registrant's goods are “toy action figures and accessories for use therewith; toy vehicles and accessories for use therewith” in Class 28. Applicant's goods in Class 28 are physical versions of strategy board games themed in the field of ornithology, birds, and wildlife, as well as accessories for use therewith (such as

“speckled eggs,” boards, and neoprene playmats).<sup>14</sup> Applicant’s goods in Class 9 and services in Class 41 are, essentially, digital versions of the board game.

We begin our analysis with the recognition that, as Applicant has argued, it tailored its application to “more closely reflect market realities” by restricting its goods and services to board and online strategy games in the field of ornithology, birds, and wildlife.<sup>15</sup> *See In re Embiid*, 2021 USPQ2d 577, at \*26-27 (quoting *In re FCA US LLC*, 126 USPQ2d 1214, 1217 (TTAB 2018), *aff’d mem.*, 778 F. App’x 962 (Fed. Cir. 2019)). But, Applicant fails to recognize that Registrant’s goods are not limited and so we must presume that Registrant’s broadly-worded goods include “all goods of the type identified, without limitation as to their nature or price.” *Id.* (quoting *Sock It to Me, Inc. v. Aiping Fan*, 2020 USPQ2d 10611, at \*8 (TTAB 2020)); *accord*, *In re Linkvest S.A.*, 24 USPQ2d 1716, 1716 (TTAB 1992). This could include, for example, toy action figures and toy vehicles fashioned as birds or other wildlife. Nor do we view Applicant’s “strategy” games as a significantly limiting factor, as virtually all games include an element of “strategy,” even if the strategy employed is uncomplicated and on a child’s level.<sup>16</sup> Finally, we are not

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<sup>14</sup> *See, e.g.*, May 24, 2021 Application, , at TSDR 44-45, 48-55. The physical versions of the games appear to be played with cards and play pieces depicting birds and small bird “eggs.” *See, e.g., id.*, , at TSDR 41, 43, 49-51. The digital versions feature depictions of these cards and accessories. *See, e.g., id.*, , at TSDR 30, 32, 62, and 64.

<sup>15</sup> 6 TTABVUE 18. We do not agree with Applicant’s argument that the conjunctive term “and” in the limiting phrase “ornithology, birds, and wildlife” is significant, inasmuch as Applicant has not demonstrated a meaningful difference between the three.

<sup>16</sup> *Cf.* Stegmaier Decl. ¶¶ 5-6 (arguing that “strategy games” are a specialized form of game, differentiated from “classic” board games that feature more luck such as Yahtzee or The Game of Life) (attached to June 15, 2022 Response to Office Action, at TSDR 20-21). However, we observe that other “classic” board or tabletop games such as Monopoly, Risk, or even chess and checkers, have significant strategic elements. *See also id.* ¶ 4, at TSDR 19 (defining both

persuaded that consumers of these goods and services would readily distinguish between figurines with “action” components and unmovable figurines, or whether figurines have super powers. Thus, we disagree with Applicant’s argument that the goods and services are not related on their face.

The third-party website evidence (summarized below) reveals that parties sell board games, downloadable and/or non-downloadable video games, and toy figurines under the same or related marks:<sup>17</sup>

- DC – board games, online games, action figures, toy cars;
- DISNEY – board games, online games, action figures;
- MARVEL – board games, online games, action figures, die-cast figures;
- FINDING NEMO – board games, online and mobile games, bird and fish figurines;
- ICE AGE – animal action figure, online games, DVD game;
- ZOOTOPIA – puzzle game, online and mobile games, PVC figurine playset;
- FALLOUT – board game, online games, downloaded games, robots and action figures and accessories;
- GAME OF THRONES – board games, online games, downloaded games, action figures and accessories; and
- RESIDENT EVIL – board games, downloaded and online games, action figures and accessories.

The record also contains evidence of third party registrations for the same marks covering action figures, toy vehicles and board games in Class 28, and digital games

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“board games” and “tabletop games” as games purchased by consumers for purposes of “gaming” together, usually around a table, which may consist of boards, cards, and other components).

<sup>17</sup> February 8, 2022 Office Action, at TSDR 10-27; February 24, 2023 Denial of Request for Reconsideration, at TSDR 51-65; July 21, 2022 Office Action, at TSDR 28-52.

in Classes 9 and 41, showing that such goods and services are of a kind that may emanate from a single source under a single mark, including those summarized below:<sup>18</sup>

- NARUTO – video game software (Class 9); toy action figures and accessories therefor, toy figures, toy figurines of molded plastic, card games, playing cards, action skill games (Class 28); non-downloadable games via the Internet (Class 41);
- ROBLOX – video game software (Class 9); Toy vehicles; toy action figures and accessories therefor, toy cars, card and board games (Class 28); online electronic, computer and video games (Class 41);
-  – computer game programs (Class 9); action figures and card games (Class 28); online video games (Class 41);
- THE CROW & design – toy action figures and accessories, and board games (Class 28);
- JIJI – video game software (Class 9); board games, human anatomical toy models, remote-controlled toy cars, toy robots (Class 28); non-downloadable game software (Class 41);
- PILLOW FIGHTERS – molded toy figures (Class 28); online non-downloadable game software (Class 41);
- POWER PLAYERS – downloadable game software (Class 9); poseable toys, action figure toys, and toy vehicles (Class 28);
- MIAMI & Design – computer game and video game software and programs (Class 9); Toy figurines (Class 28);
- FC CINCINNATI & design – downloadable video game software (Class 9); Toy figurines (Class 28);
- MOMENTUM – downloadable and recorded video and computer game programs and software (Class 9); Toy vehicles (Class 28);

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<sup>18</sup> July 21, 2022 Office Action, at TSDR 7-27; February 24, 2023 Denial of Request for Reconsideration, at TSDR 10-43. We have included only use-based registrations based on Trademark Act Section 1(a).

-  – downloadable computer game software (Class 9); Action figures (Class 28);
-  – downloadable game software (Class 9); dolls, board games, molded plastic figurines (Class 28);
-  – downloadable game software (Class 9); action figure toys and board games (Class 28); providing online computer game (Class 41);
-  – downloadable and recorded computer game software (Class 9); play figures, toy figures, toy figures and play sets for action figures, action figures and accessories therefor, toy vehicles, radio-controlled toy vehicles (Class 28);
-  – downloadable video game software featuring motocross, mountain bike, and motorcycle riding (Class 9); Toys, namely, toy figures, toy model motorcycles (Class 28);
- TY THE TASMANIAN TIGER – downloadable computer game software (Class 9); Action figures; Toy figures (Class 28); and
- BANDAI NAMCO – downloadable computer game software (Class 9); action figures, toys in the nature of modeled plastic toy figurines, toy figures (Class 28); online video games (Class 41); online video games (Class 42).

Applicant contends this evidence is deficient for several reasons, including that certain registrations do not recite “board games,” “toy action figures,” and/or “toy

vehicles.”<sup>19</sup> We have taken the differences in the goods and services into account in reviewing this evidence, but find that, as a whole, the quantity and quality of evidence of third-party use and registration is sufficient “to provide a reasonable predicate supporting the Examining Attorney’s position on relatedness as to each class of goods and services and shift the burden to Applicant to rebut the evidence with competent evidence of its own.” *In re Country Oven*, 2019 USPQ2d 443903, at \*10 (ten third-party registrations provided a reasonable predicate that goods and services related) (citing *In re Pacer Tech.*, 338 F.3d 1348, 1351, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)); *In re Detroit Athletic Co.*, 128 USPQ2d at 1050 (crediting relatedness evidence showing that several third parties use the same mark for the goods and services at issue because “[t]his evidence suggests that consumers are accustomed to seeing a single mark associated with a source that sells both”). In particular, as shown above, the Examining Attorney has supplied evidence of twenty common law uses and registrations relevant to Applicant’s Class 9 goods; fifteen relevant to Applicant’s Class 28 goods; and fourteen relevant to Applicant’s Class 41 services.

Applicant relies on Mr. Stegmaier’s declaration that the “house marks” referenced in the internet screenshots (such as Disney, DC, and Marvel) are “not generally

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<sup>19</sup> The parties’ dispute as to whether “toy action figures” must include moveable components or represent a superhero from popular media is not of great importance, as Applicant has failed to show that consumers distinguish between figurines with and without a moveable component, or figurines with and without “super powers.” And, Applicant has failed to demonstrate that an “action figure” may not depict a bird or other wildlife; in fact, the Examining Attorney provided evidence of at least one wildlife action figure (“Sid Ice Age Collision Course Action Figure” (February 24, 2023 Denial of Request for Reconsideration, at TSDR 55)) and a super hero action figure with bird-like wings (“Marvel Avengers Titan Hero Series Captain America” (February 8, 2022 Office Action, at TSDR 23)).

identifiable as a brand for such goods (as opposed to the game titles that operate as designations of source for the particular goods), and therefore are not evidence that the same mark can be expected to be used by the same source for both board games and action figures.”<sup>20</sup> Applicant equates this to the Board’s long-established precedent that third-party registrations in the nature of house marks used for a wide variety of items are of little value to show relatedness of goods and services.<sup>21</sup> Mr. Stegmaier also states, in essence, that the use evidence shows only that well-known brands such as Disney or Marvel are licensed for use on classic board games and therefore purchasers know that these companies are not the source of the games.<sup>22</sup>

After careful review of the evidence, we conclude that Applicant has not provided sufficient support for its implicit assertion that only very famous brands offer both Applicant’s and Registrant’s goods and services. Other use evidence discussed above and the third party registration evidence show the opposite. Thus, especially considering the high degree of similarity between the marks, we find that Applicant’s and Registrant’s goods and services are related under the second *DuPont* factor.

The third *DuPont* factor considers “the similarity or dissimilarity of established, likely-to-continue trade channels.” *In re Detroit Athletic Co.*, 128 USPQ2d at 1052 (quoting *DuPont*, 476 F.2d at 1361). The Internet evidence submitted by the

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<sup>20</sup> See 6 TTABVUE 19-21 (citing Stegmaier Decl. ¶¶ 8-11). The Examining Attorney argues that the single, self-serving declaration should not be given weight. 8 TTABVUE 12-15. We disagree; rather, we give the declaration the appropriate probative weight it deserves. See *Luxco, Inc. v. Consejo Regulador del Tequila, A.C.*, 121 USPQ2d 1477, 1479 (TTAB 2017).

<sup>21</sup> 6 TTABVUE 22.

<sup>22</sup> *Id.* at 22-23 (citing Stegmaier Decl. ¶¶ 8-9).

Examining Attorney demonstrates that Registrant's and Applicant's goods and services may be found in some of the same trade channels, namely, offered by a single entity advertising on a single website to at least some of the same (toy and game) consumers. Applicant does not discuss this factor, thus "[a]pparently conceding this issue." *In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1740 (TTAB 2016).

Accordingly, we find that the second and third *DuPont* factors weigh in favor of a finding of likelihood of confusion in all classes.

### **C. Purchasing Conditions and Sophistication of Consumers**

The fourth *DuPont* factor considers "[t]he conditions under which and buyers to whom sales are made, i.e., 'impulse' vs. careful, sophisticated purchasing." *In re Embiid*, 2021 USPQ2d 577, at \*31 (quoting *DuPont*, 177 USPQ at 567). Purchaser sophistication or degree of care may tend to minimize likelihood of confusion. Conversely, impulse purchases of inexpensive items may tend to have the opposite effect. *Palm Bay Imps.*, 73 USPQ2d at 1695.

Applicant argues, relying on Mr. Stegmaier's declaration, that this factor is highly significant (if not dispositive) because consumers of strategy games are "discriminating" and "careful," and "strategy board games are rarely 'impulse' purchases."<sup>23</sup> In response, the Examining Attorney argues that Applicant's packaging and advertising indicates that "purchasers of applicant's goods and services are not limited exclusively to sophisticated gamers but could also include children as young

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<sup>23</sup> Stegmaier Decl. ¶¶ 5-17 (attached to June 15, 2022 Office Action Response, at TSDR 20-21).

as ten years old”; and “strategy board games are frequently sold for as low as \$25 and thus could very easily be considered impulse purchases.”<sup>24</sup> The Examining Attorney argues that the “least sophisticated potential purchaser” standard applies.<sup>25</sup>

We agree with the Examining Attorney. Given the nature of Applicant’s and Registrant’s identified goods and services, some purchasers may be very unsophisticated – such as children or gift givers. Because there is nothing in the identifications of goods or services of the involved or cited marks that indicates a price point or specific type of consumer, the goods and services are presumed to include items at all price points, including inexpensive items, sold to all types of consumers, including children and casual gameplayers, as well as people who buy gifts for them.<sup>26</sup> *See In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1413 (TTAB 2015).

Ordinary consumers of such games and toys are likely to exercise only ordinary care, and, given the lack of price restrictions in the identifications, some may even buy inexpensive items on impulse. *Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”).

We find that the fourth *DuPont* factor is neutral.

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<sup>24</sup> 8 TTABVUE 17.

<sup>25</sup> *Id.* (citing *In re FCA US LLC*, 126 USPQ2d at 1222).

<sup>26</sup> Indeed, the evidence of record confirms that the prices for Applicant’s goods and services range from as little as \$6 for some digital products to \$55 for physical board games, and from \$12-20 for accessories. *See, e.g.*, May 24, 2022 Application, at TSDR 28, 48-53. Registrant’s goods also can be relatively low-priced. *See, e.g.*, February 8, 2022 Office Action, at TSDR 23 (\$13-20); July 21, 2022 Office Action, at TSDR 30 (\$30), 32 (\$13), and 39 (\$25).

#### D. Other Considerations

The thirteenth *DuPont* factor examines “any other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. Rarely invoked, the thirteenth factor is intended to accommodate “the need for flexibility in assessing each unique set of facts.” *In re Strategic Partners, Inc.*, 102 USPQ2d 1397, 1399 (TTAB 2012).

Applicant argues that we should take the proffered ten pairs of third-party trademark registrations<sup>27</sup> into account under the thirteenth factor to show that identical marks are able to coexist on the register for the types of goods and services at issue here.<sup>28</sup> We do not find this evidence persuasive because “the Board must decide each case on its own merits.” *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *see also Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973) (“Each case must be decided on its own facts and the differences are often subtle ones.”); *On-Cor Frozen Foods, Inc. v. Ralston Purina Co.*, 220 USPQ 567, 569 (TTAB 1983) (“[I]n view of the specific fact situations in the foregoing cases and keeping in mind that there is no per se rule regarding food items but that each case must be decided on its own facts”).

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<sup>27</sup> These are: ROOT (board games and electronic action toys); CROSSFIRE (equipment sold as a unit for playing a parlor game and toy cars); HAPPY CAMPER (tabletop games and remote control hobby model vehicles); OUTBREAK (tabletop games and remote control hobby model vehicles); RUCKUS (board games and remote control hobby model vehicles); STRIDER (computer game software and toy action figures and toy figures); REV IT UP (game software and toy vehicles); HIGH VOLTAGE (computer game software and toy vehicles); THE OUTER LIMITS (online computer games and action figures); RED ALERT (on-line computer games and toy action figures, and toy vehicles). *See* January 23, 2023 Request for Reconsideration, at TSDR 24-113.

<sup>28</sup> 6 TTABVUE 11; *see also* 9 TTABVUE 3-4.

Furthermore, only ten pairs of registrations – five for board games and toy action figures or toy vehicles, and five for software or online games and toy action figures or toy vehicles – is far from the quantity of evidence considered relevant in *In re Thor Tech, Inc.*, 113 USPQ2d 1546, 1549 (TTAB 2015), where the Board held (under the second *DuPont* factor) that “evidence of [fifty] third-party registrations for the same or very similar marks owned by different entities for vehicles and recreational vehicle trailers rebut[ted] the relevant, two third-party registrations made of record by the Trademark Examining Attorney.” We also have no information on the strength or weakness of the shared terms in these third-party marks, whether they registered pursuant to consent agreements or after Board proceedings, or whether evidence was introduced to distinguish the respective goods and services.

Thus, in the absence of persuasive evidence bearing on the thirteenth *DuPont* factor, we find it neutral.

### **III. Conclusion**

We have considered all of the evidence and arguments bearing on likelihood of confusion. In sum, the marks are highly similar and are used in connection with related goods and services that move in the same channels of trade for those goods and services. These *DuPont* factors weigh in favor of finding that confusion is likely. The fourth and thirteenth factors are neutral.

Upon weighing the relevant *DuPont* factors, we conclude that confusion is likely between Registrant’s mark WINGSPAN for the identified goods in International

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Class 28 and Applicant's mark WINGSPAN for the identified goods and services in International Classes 9, 28, and 41.

**Decision:** The refusal to register Applicant's mark is affirmed under Trademark Act Section 2(d) in all classes. 15 U.S.C. § 1052(d).